

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
MCALLEN DIVISION

IN RE: § CASE NO. 16-70551-M-11  
§  
SKYLINE EMS, INC., §  
DEBTOR §  
§ (Chapter 11)

**MOTION FOR ORDER AUTHORIZING  
PAYMENT OF PRE-PETITION TAXES  
AND REQUEST FOR EXPEDITED HEARING**

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**THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.**

**REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEYS.**

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TO THE HONORABLE UNITED STATES BANKRUPTCY COURT:

Skyline EMS, Inc. (“Skyline” or “Debtor”), Debtor and Debtor in Possession, files this Motion for Order Authorizing Payment of Prepetition Taxes and request for Expedited Hearing (the “Motion”) and in support thereof respectfully shows the Court as follows:

**I. JURISDICTION**

2. This Court has jurisdiction by virtue of 28 U.S.C. §§ 157 and 1334. This matter

is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1), (b)(2)(A) and (M).

## **II. VENUE**

3. Venue is proper in this district pursuant to 28 U.S.C. § 1408(1) because the Debtor's place of business has been located in this district for more than 180 days preceding the filing of this bankruptcy case.

## **III. BACKGROUND INFORMATION**

### **A. Overview of the Debtor**

4. Skyline EMS, Inc. ("Skyline" or "Debtor") filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code") on December 24, 2016 (the "Petition Date"). The Debtor continues to operate its business and manage its property as a debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Debtor's bankruptcy case and no official committee of unsecured creditors has yet been established.

5. Skyline operates an ambulance transportation company servicing the McAllen, Mission and Edinburg metropolitan area.

6. The Debtor's primary source of income is derived from the CMS Medicare and other private insurance companies which amounts to approximately \$100,000 per month.

7. As of the Petition Date, the Debtor had assets of approximately **\$ 1,134,337.91**, consisting primarily of accounts receivables from CMS Medicare and the private insurance companies.

### **B. Events Leading to Bankruptcy**

#### Debtor's Prior (15-70534 ) 2015 Chapter 11 Bankruptcy Filing

8. Debtor filed a prior Chapter 11 Bankruptcy petition on October 19, 2015 under case number 15-70534. During its pre-15-70534 petition operations, Debtor's billing

operations underperformed causing large income losses to Debtor. Consequently, Debtor began to lose its ability to meet its financial obligations, including payment of its trust funds toward the Internal Revenue Service. The Internal Revenue Service, (“IRS”), in an attempt to protect the employees trust funds, began to seize a large part of the Debtor’s revenue streams. Not surprisingly, the Debtor began to lose its ability to fund ongoing operations, further lost its ability to fund trust fund payments to the IRS and as a result filed for Chapter 11 bankruptcy protection.

9. During the pendency of 15-70534, Debtor began to reorganize its operations and instituted carefully calculated employee layoffs as part of its cost cutting measures. At least one employee filed a fraud complaint with Debtor’s main source of revenue – CMS, (“Medicare”). As part of its investigation, Medicare withheld funds from Debtor, causing Debtor to not submit part of 2<sup>nd</sup> quarter and a large part of the 3<sup>rd</sup> quarter employee trust funds to the IRS.

10. Although, the Debtor was cleared following the Medicare investigation, Debtor fell behind in its post-petition payments to the IRS. Once payments resumed, Debtor paid off 4<sup>th</sup> quarter and began paying off 3<sup>rd</sup> quarter post-petition IRS trust fund debt.

11. This case was dismissed on December 22, 2017 and almost immediately, the IRS began levying on the Debtor’s revenue from Medicare. This petition under the above caption was filed in order to protect Debtor’s operations and services.

#### **IV. BUSINESS REASONS JUSTIFY PAYING PRE-PETITION EMPLOYEES TAXES**

12. The Debtor currently has 29 employees, an amount that is significantly less than before the Debtor filed its first bankruptcy.

13. As of the petition date, Debtor owes approximately \$330,000 to the IRS in trust fund employee taxes.

14. Tax Obligations. Skyline withholds federal, state, and local employment-related taxes, including federal income taxes, Medicare and social security taxes, and state unemployment insurance from wages and salaries of its employees. Skyline requests permission to pay all outstanding prepetition amounts owed in connection with this obligation.

15. The Debtor requests authority to make \$5,000 trust fund pre-petition payment to the IRS. By this motion, the Debtor is seeking to pay prepetition taxes of approximately \$5,000.00 per month.

#### **V. RELIEF REQUESTED**

16. By this Motion, Debtor requests, pursuant to Sections 363(b), 365, 549 and 105(a) of the Bankruptcy Code, that the Court authorize the Debtor to pay the Prepetition Employee Taxes described herein.

17. A bankruptcy court may authorize the payment of prepetition obligations when necessary to facilitate a debtor's reorganization. *See, e.g., In re Equalnet Communications Corp.*, 258 B.R. 368 (Bankr. S.D. Tex. 2000). This authority stems from the common-law "necessity of payment" doctrine, which courts have applied when the failure to pay prepetition obligations poses a real and significant threat to a debtor's reorganization. *See Dudley v. Mealey*, 147 F.2d 268 (2d Cir. 1945), *cert. denied* 325 U.S. 873 (1945). In a well-established line of cases, this doctrine was first applied in conjunction with railroad reorganizations. *See, e.g., Gregg v. Metropolitan Trust Co.*, 197 U.S. 183 (1905) ("the payment of the employees of the [rail]road is more certain to be necessary in order to keep it running than payment of any other class of previously incurred debt"); *Miltenberger v. Logansport, Crawfordsville & Southwestern Railway Co.*, 106 U.S. 286 (1882) (permitting the payment of pre- receivership claim prior to reorganization in order to prevent the cessation of

“indispensable business relations”).

18. The “necessity of payment” doctrine was eventually expanded beyond railroad reorganizations, beginning with *Dudley v. Mealey*. 147 F.2d 268. In *Dudley*, the court held that the creditors’ interest in continuing the debtor’s hotel business justified paying the prepetition claims of creditors who furnished supplies essential to keeping the hotel open. *Id.* at 271. Numerous courts have applied *Dudley*’s doctrine in situations similar to this Case, recognizing that the payment of certain prepetition wage, salary, medical-benefit, and business-expense claims was justified since no business debtor can hope to reorganize without the cooperation of its employees. *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175-76 (Bankr. S.D.N.Y. 1989).

19. The modern analogue to the “necessity of payment” doctrine appears in Section 105(a) of the Bankruptcy Code, which provides, in pertinent part: “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). This includes the power to authorize the payment of the Employee Trust Funds.

20. Courts often use their equitable powers to authorize payment of a debtor’s prepetition obligations where, as here, such payment is necessary to effectuate the “paramount purpose” of Chapter 11 reorganization—which is to prevent the debtor from going into liquidation and to preserve the debtor’s potential for rehabilitation. Without question, the payment of the Employee payroll taxes to the Taxing Authorities is necessary. It is in the best interest of the Debtors’ estates that the Employee payroll taxes be timely paid so as to avoid administrative difficulties. Withholding the payment of the Employee payroll taxes would likely cause the Internal Revenue Service to take precipitous action, including a marked increase in audits and lien filings. Prompt and regular payment of the Employee payroll taxes will avoid this unnecessary governmental action.

21. A provision of the Bankruptcy Code arguably allows for the possibility of the payment by a debtor-in-possession of certain general unsecured prepetition claims prior to confirmation: § 362. Section 362(a)(6) provides that the filing of the petition acts as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6). Under this provision, the collection of prepetition claims is not prohibited; it is only stayed. *In re Cei Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex., 2004).

The *stay* of the collection of prepetition claims may be terminated, annulled or modified by the court "for cause." 11 U.S.C. § 362(d). The language of § 362(d) provides that "the court *shall* grant relief from the stay ... for cause...." *Id.* (emphasis added). Furthermore, relief from the stay pursuant to § 362(d) may be requested by a "party in interest." *Id.* Thus, a debtor-in-possession and its "critical vendors," each of whom would certainly qualify as parties in interest in a bankruptcy case, could request relief from the stay under § 362(d) "for cause" — that "cause" being the urgency and necessity of paying the prepetition claims, such payment being the only means of protecting the going concern value of the operating business in Chapter 11. *In re Cei Roofing, Inc.*, 315 B.R. at 59.

22. Trust fund taxes are afforded priority status under section 507 of the bankruptcy code. The Debtor submits that sufficient assets exist to pay pre-petition trust fund debt owed in full. Accordingly the proposed relief will affect only the timing of the payment of the trust fund taxes and will not prejudice the other creditors or parties in interest.

23. Moreover Courts have held that trust fund taxes should be held for the benefit of the taxing authority and they may not be property of the estate. See e.g. *Begier vs. Internal Revenue Service*, 496 U.S. 53 (1990); *In re Megafoods Stores, Inc.*, 163 F3d 1063, 1067-68 (9<sup>th</sup> Cir. 1998); *In re Al Copeland Enterprises, Inc.*, 991 F2d 233, 237 (5<sup>th</sup> Cir. 1993) (holding that Debtor obligated to pay sales and use taxes because they constituted trust fund taxes).

24. Additionally, the Debtor's officers and directors may be held personally liable, either civilly or criminally, under federal laws that define them as fiduciaries for the Taxing Authorities with respect to collecting the Employee Payroll Taxes. A prosecution of these individuals for failing to pay the Employee Payroll Taxes to the Taxing Authorities would seriously undermine the Debtor's ability to reorganize.

25. In sum, the payment of the Debtors' prepetition Employee Payroll Taxes in full and on time is necessary for the conservation of the Debtor's estates. A delay in the payment of the Employee Payroll Taxes could cause certain governmental authorities to take aggressive action with respect to the Debtor, such as filing liens or seeking to modify the automatic stay. Responding to these actions would add unnecessary administrative expenses to the estates and needlessly distract the Debtor from their primary focus of reorganizing the Debtor's business and finances.

26. Authorizing the payment of Prepetition Employee Payroll Taxes is essential to the Debtor's prospect for successfully emerging from Chapter 11. If these payments are not made, the Employees will likely abandon the Debtor for other employers, and the Debtor will find its prospects for a successful reorganization doomed from the start. The Employees' specialized skills are essential to the Debtor and represent its most critical resource. Any failure to pay the Prepetition Employee Payroll Taxes will deprive the Debtor of a genuine opportunity at a "fresh start."

WHEREFORE, Debtor respectfully prays that the Court approve this Motion in its entirety and grant all the relief requested herein and grant the Debtor such further relief as it deems just and proper.

Dated: February 14, 2017

Respectfully submitted,

Law Office of Antonio Martinez, Jr., P.C.

*/s/ Antonio Martinez, Jr.*

Antonio Martinez, Jr.  
317 W. Nolana Ave. Ste C  
McAllen, TX 78504  
956-683-1090  
Fax : 956-683-1090  
Email: [martinez.tony.jr@gmail.com](mailto:martinez.tony.jr@gmail.com)  
Attorney for Debtor Skyline EMS, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served on the United States Trustee and all parties registered with the ECF system, email, fax, or mail on this case via electronic notice.

Date: 2/14/2017

*/s/ Antonio Martinez, Jr.*

Antonio Martinez, Jr.

Label Matrix for local noticing

0541-7

Case 16-70551

Southern District of Texas

McAllen

Tue Feb 14 22:50:03 CST 2017

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United States Bankruptcy Court  
1133 North Shoreline Blvd #208  
Corpus Christi, TX 78401-2042

Skyline EMS, Inc.

310 East Main Blvd.

Pmb 213

Alton, TX 78573-6872

Texas Workforce Commission

Rachel R. Obaldo

c/o Sherri K. Simpson, Paralegal

P.O. Box 12548

Austin, TX 78711-2548

A/R Concepts  
17806 W. Interstate 10 Ste 104  
San Antonio, TX 78257-8223Airgass USA LLC  
110 West 7th St. Ste 1400  
Tulsa, OK 74119-1077Ambit Energy  
P.O. Box 660462  
Dallas, TX 75266-0462Edimis  
P.O. Box 1567  
Collierville, TN 38027-1567Hidalgo County  
c/o Diane W. Sanders  
Linebarger Goggan Blair & Sampson, LLP  
P.O. Box 17428  
Austin, TX 78760-7428IRS  
Centralized Insolvency  
P.O. Box 7346  
Philadelphia, PA 19101-7346Moore Medical LLC  
1690 New Britain Ave  
P.O. Box 4066  
Farmington, CT 06034-4066Neveria Los Barielles  
1626 E Griffin Pkwy Ste A  
Mission, TX 78572-3475Pulmonair  
5563 DeZavala Road, Ste 130  
San Antonio, TX 78249-1736RGV Sanitation Control  
Edinburg, TX 78540RYANLAW  
100 Congress Ave. Suite 950  
Austin, TX 78701-2725Sprint  
P.O. Box 8077  
London, KY 40742-8077(p)C O AMERICAN INFOSOURCE LP  
4515 N SANTA FE AVE  
OKLAHOMA CITY OK 73118-7901Texas National Bank  
P.O. Box 777  
Mercedes, TX 78570-0777Texas National Bank  
P.O. Box 777  
Mercedes, Texas 78570-0777Texas Workforce Commission  
101 E. 15th St.  
Austin, TX 78778-0001Texas Workforce Commission  
Regulatory Integrity Division - SAU  
Room 556  
101 E. 15th Street  
Austin, TX 78778-0001Time Warner Cable  
P.O. Box 460849  
San Antonio, TX 78246-0849Top Frog Diesel-N-Gas  
204 East Veterans Memorial Blvd  
Harker Heights, TX 76548-1338US Trustee  
606 N Carancahua  
Corpus Christi, TX 78401-0680UnitedHealthcare Insurance Company  
Attn: CDM - Bankruptcy  
185 Asylum Street - 03B  
Hartford, CT 06103-3408Webmedic Pro  
11 State St.  
Woburn, MA 01801-2050Antonio Martinez Jr  
Attorney at Law  
317 W. Nolana  
Suite C  
McAllen, TX 78504-1302